A

LEE KUET CHIN

v.

GARAI JELIAN; TAN KOK SEN (INTERVENER)

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
HAIDAR MOHD NOOR JCA

C

[CIVIL APPEAL NO: Q-02-86-1997]
29 JUNE 2006

LAND LAW: *Restraints on dealings - Prohibitory order - Setting aside, appeal against - Plaintiff obtained judgment in default against defendant* D *- Whether plaintiff could execute judgment against defendant's land - Whether defendant had divested himself of all beneficial interest in land - Whether prohibitory order rightly set aside*

E

The defendant had entered into an agreement with the intervener to sell to the latter two pieces of land of which he was the registered proprietor. The intervener paid off the purchase price in full and took in his favour a duly executed memorandum of transfer together with an express declaration of trust and a registered power of attorney. The plaintiff then issued a writ

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against the defendant claiming a debt of RM70,564.95 and judgment in default was entered against the defendant. The plaintiff, meanwhile, had earlier entered a caveat against one of the defendant's two lots, basing his right to the caveat on the monies allegedly due from the defendant. The caveat lapsed and the

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plaintiff failed to obtain an order from the High Court extending the caveat. Later, the plaintiff obtained a prohibitory order to execute the judgment he had obtained in default of the defendant's appearance. He then caused the prohibitory order to be registered against the register document of title to the lot

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against which the plaintiff had lodged a caveat. Later still, the intervener intervened in the plaintiff's suit and applied to set aside the prohibitory order. That application was heard and granted by the senior assistant registrar, and the plaintiff's subsequent appeal was dismissed by the judicial commissioner. Hence, the present appeal. The only real issue in the present case was whether the

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plaintiff had any right to execute his judgment against the lot in question.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The learned senior assistant registrar, whose decision and reasons were affirmed by the learned judicial commissioner, correctly held that the plaintiff could not execute his judgment against the defendant's land because the defendant had no property in it. It is settled by high authority "... that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (purchasers) are bare trustees for the appellants of the said land ...", per Ong Hock Sim FJ in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors*. Equally, a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full. And once there has been a divesting of beneficial ownership by a registered proprietor, his creditor cannot look to his land for satisfaction of any money judgment that may have been obtained. In the present instance, there was not a mere constructive trust that was imposed by law whenever there was a valid contract for sale. This was a case where the defendant had expressly constituted himself a trustee for the intervener and, thus, he had no attachable interest in the land in question. It followed that the plaintiff's prohibitory order could not stand and was rightly set aside. And it must be emphasised that this was not a case in which the plaintiff had challenged the genuineness of the sale. (paras 3, 4 & 5)

Bahasa Malaysia *translation of headnotes*

Defendan menandatangani satu perjanjian dengan pencelah bagi menjual dua bidang tanah miliknya kepada pihak terkemudian tersebut. Setelah membayar sepenuhnya harga jualan, pencelah diberikan memorandum pindahmilik yang sempurna diisi, deklarasi amanah dan surat kuasa wakil yang siap didaftar. Walau bagaimanapun, selepas itu, suatu writ telah dikeluarkan oleh plaintif terhadap defendan, menuntut hutang berjumlah RM70,564.95. Plaintif kemudian memasukkan penghakiman ingkar terhadap defendan. Plaintif juga, sebelum itu, telah memasukkan kaveat terhadap salah satu dari dua bidang tanah defendan, berdasarkan kepada hutang yang dikatakan belum dibayar oleh defendan. Kaveat telah luput tanpa plaintif memperoleh sebarang perintah

lanjutan dari Mahkamah Tinggi. Walaupun begitu, plaintif kemudiannya memperoleh perintah larangan bagi melaksanakan penghakiman ingkar kehadiran di atas dan seterusnya telah mendaftar perintah terhadap dokumen hakmilik tanah defendan yang dikaveatkan. Berikutnya, pencelah mencelah terhadap guaman plaintif dan memohon untuk mengenepikan perintah larangan. Permohonan tersebut didengar dan dibenarkan oleh penolong kanan pendaftar, sementara rayuan plaintif terhadap keputusan tersebut ditolak oleh pesuruhjaya kehakiman. Plaintif merayu dan satu-satunya isu penting yang berbangkit adalah sama ada plaintif berhak untuk melaksanakan penghakiman yang diperolehinya terhadap lot tanah defendan yang dikaveatkannya di sini.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Yang arif penolong kanan pendaftar, yang perintah dan alasan-alasannya telah disahkan oleh yang arif pesuruhjaya kehakiman, telah dengan betulnya memutuskan bahawa plaintif tidak boleh melaksanakan penghakiman terhadap tanah defendan oleh kerana harta dalam tanah tersebut tidak lagi dimiliki oleh defendan. Telah diputuskan oleh autoriti atasan "... bahawa penjual, setelah menerima sepenuhnya harga jualan dan setelah menyerahkan milikan tanah kepada perayu (pembeli), menjadi bare trustee tanah tersebut bagi pihak perayu ...": oleh Ong Hock Sim HMP dalam *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors*. Begitu juga, pada waktu memorandum pindahmilik dimeterai dan harga jualan dibayar sepenuhnya, penjual dianggap sebagai telah melucutkan segala hakmilik benefisial terhadap tanah. Dan sebaik berlaku perlucutan hakmilik benefisial oleh seseorang penjual, pemiutangnya tidak lagi boleh menyentuh tanah tersebut bagi memenuhi penghakiman wang ringgit yang diperolehinya. Dalam kes semasa, undang-undang tidak semata-mata mengenakan amanah konstruktif terhadap sesuatu kontrak jualan yang sah. Ini adalah kes di mana defendan telah dengan jelas meletakkan dirinya sebagai trustee bagi pihak pencelah, dan kerana itu tidak mempunyai sebarang kepentingan lagi dalam tanah tersebut. Ianya mengikut bahawa perintah larangan plaintif tidak boleh bertahan dan telah diketepikan dengan teratur. Harus juga ditekan bahawa ini bukanlah suatu kes di mana plaintif telah mencabar kesahihan penjualan.

Case(s) referred to:

Chua Chee Hung & Ors v. QBE Supreme Insurance Bhd [1990] 1 CLJ 669; [1990] 1 CLJ (Rep) 49 ***(refd)***

Ho Wah & Anor v. United Malayan Banking Corp Bhd [1994] 2 CLJ 587 SC ***(refd)***

J Raju v. Kwong Yik Bank Bhd & Anor [1994] 2 CLJ 695 SC ***(refd)***

Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(foll)***

M & J Frozen Food & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 ***(foll)***

Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals [1994] 3 CLJ 21 SC ***(refd)***

Legislation referred to:

Land Code (Sarawak), s. 178

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co
For the respondent/intervener - Lim Swee Huat; M/s SH Lim & Co

[Appeal from High Court, Miri; Suit No: MR 34-1994]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The facts of this case are straight forward. There are three parties in this case. They are the plaintiff, the defendant and the intervener. As long ago as 5 April 1988 the defendant entered into an agreement in writing with the intervener to sell to the latter two pieces of land of which he was the registered proprietor. The intervener paid off the purchase price in full and took in his favour a duly executed memorandum of transfer together with an express declaration of trust and a registered power of attorney. The sale was subject to obtaining the consent of the Director of Lands and Surveys, Sarawak. That consent came only on 18 April 1994.

[2] On 13 August 1994 the plaintiff caused to be issued a writ against the defendant claiming a debt of RM70,564.95. Judgment in default was entered against the defendant on 13 October 1994. In the meantime, the plaintiff had, on 16 November 1989, entered a caveat against one of the defendant's two lots basing his right to the caveat on the monies allegedly due from the defendant.

That caveat lapsed and was removed by the Director of Lands and Surveys pursuant to s. 178 of the Land Code of Sarawak after the requisite three months notice had been given and the plaintiff had failed to obtain an order from the High Court extending the caveat. Later, the plaintiff obtained a prohibitory order to execute the judgment he had obtained in default of the defendant's appearance. He then caused the prohibitory order to be registered against the register document of title to the lot against which he had lodged his caveat. Later still, the intervener intervened in the plaintiff's suit and applied to set aside the prohibitory order. That application was heard and granted by the senior assistant registrar. The plaintiff appealed to the judicial commissioner who dismissed the appeal. The plaintiff then appealed to us. We dismissed the appeal without calling upon counsel for the respondent.

[3] The only real issue in this case is whether the plaintiff had any right to execute his judgment against the lot in question. That issue was discussed and answered against the plaintiff by the senior assistant registrar, Mr Robert Pasang Alam, in a well written and learned judgment that certainly merits reporting in the law journals. The learned registrar whose decision and reasons were affirmed by the learned judicial commissioner held that the plaintiff could not execute his judgment against the defendant's land because the defendant had no property in it. In our judgment this is an entirely correct finding.

[4] It is settled by high authority "... that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants (the purchasers) are bare trustees for the appellants of the said land ...", per Ong Hock Sim FJ in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45. Equally, a vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full. See, *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116. And once there has been a divesting of beneficial ownership by a registered proprietor his creditor cannot look to his land for satisfaction of any money judgment that may have been obtained. That is why you find Ong CJ (Malaya) saying in *Karuppiah Chettiar v. Subramaniam* that:

It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

[5] In the present instance there is not a mere constructive trust that is imposed by law whenever there is a valid contract for sale (see, *M & J Frozen Food & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15; *Ho Wah & Anor v. United Malayan Banking Corp Bhd* [1994] 2 CLJ 587; *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 2 CLJ 695; *Yeong Ah Chee v. Lee Chong Hai & Anor and other appeals* [1994] 3 CLJ 21; *Chua Chee Hung & Ors v. QBE Supreme Insurance Bhd* [1990] 1 MLJ 480). This is a case where the defendant has expressly constituted himself a trustee for the intervener. So he had no attachable interest in the land in question. It follows that the plaintiff's prohibitory order cannot stand and was rightly set aside. And we must emphasise that this is not a case in which the genuineness of the sale was challenged by the plaintiff.

[6] For the reasons already given we found this to be an appeal devoid of any merit. It was accordingly dismissed and the usual orders consequent upon a dismissal were made.